In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-317

SHELL OIL COMPANY,
Petitioner,

V.

MARY OLSEN, ARGONAUT INSURANCE COMPANY, CHRISTINE W. CARVIN, and GORDON DAVIS WALLACE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Shell Oil Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 25, 1979.

OPINIONS BELOW

This case was tried before Federal District Judge Frederick J.R. Heebe in the United States District Court for the Eastern District of Louisiana. The opinion of the district court was entered in two parts. These opinions appear in the appendix hereto.

The district court found the sole cause of the deaths and injuries at issue here to be the negligence of Movible Offshore, Inc., the employer of the dead and injured men. The dead and injured men, therefore, recovered nothing except compensation benefits, and appeals to the Court of Appeals for the Fifth Circuit followed. The first decision of the Fifth Circuit Court of Appeals is found at 561 F.2d 1178 (5th Cir. 1977). In that opinion the Fifth circuit decided several issues and proposed that certain issues be certified to the Louisiana Supreme Court. Rehearing en banc was then sought by Shell Oil Company, but denied by the Fifth Circuit, at 565 F.2d 164, 165 (5th Cir. 1977).

The opinion certifying certain issues to the Louisiana Supreme Court is found at 574 F.2d 194 (5th Cir. 1978). The decision of the Louisiana Supreme Court deciding those certified issues is reported at 365 So.2d 1285 (La. 1978).

After the decision of the Louisiana Supreme Court the Court of Appeals for the Fifth Circuit rendered its final decision on May 25, 1979; that decision is reported at 594 F.2d 1099 (5th Cir. 1979).

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was entered on May 25, 1979. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Can state law be utilized as "surrogate federal law" on the outer continental shelf to contravene the congressional intent behind the passage of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972.

2. Whether the Fifth Circuit Court of Appeals' holding that a fixed platform on the outer continental shelf is a "building" is in conflict with the Outer Continental Shelf Lands Act.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 43:
§1333(a)(2).

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

United States Code, Title 43
§ 1333(c)

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b), compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this Section . . . .

United States Code, Title 33
§905(b)

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

On May 6, 1970, a hot water heater explosion occurred aboard a fixed platform owned by Shell Oil Company in the Gulf of Mexico, off the coast of Louisiana. The platform, located on the Outer Continental Shelf, was used for the exploration and production of oil and gas.

At the time of the explosion, drilling was being conducted from the platform by a drilling contractor known as Movible Offshore, Inc. (Movible). The individual plaintiffs in this case are the legal representatives of the men killed by the explosion except for Gordon Wallace, who sued for personal injuries. All decedents and Wallace were employees of Movible. All plaintiffs invoked the jurisdiction of the district court through diversity of citizenship. 28 U.S.C.A. § 1332.

To conduct its drilling operations, Movible placed its modular and movable drilling rig on the platform some time prior to the explosion. Before this equipment was put aboard Shell's platform, it consisted simply of two completely naked decks, one above the other, supported by steel legs resting on the sea bed. By contradistinction, Movible's drilling rig consisted of three component packages including a living quarters module, a drilling rig module, and an equip-

ment module. The ultimate result was, therefore, that everything at the scene of the explosion except the naked platform was owned by Movible.

Movible's modular living quarters unit, similar in construction to a mobile home, provided a galley, sleeping quarters, bathroom facilities, and recreational facilities. The unit was equipped with two electric water heaters, one of which exploded and caused the deaths and injuries at issue. It is undisputed that the living quarters, its water heaters, the living rig module, and the equipment module were wholly owned by Movible.

As Movible's name implies, it specializes in providing equipment to, and drilling wells, at different locations offshore in the Gulf of Mexico. That is, Movible's drilling rig was designed and constructed to be moved from one platform to another. The living quarters module, for example, was equipped with skids to facilitate transport. After the completion of drilling on one platform, cranes transfer the various modules to a barge which transports them to the platform of a new customer.

Under the working arrangement in effect between Shell and Movible, two Movible drilling crews consisting of six men each worked opposite shifts so that the drilling rig could be kept in operation 24 hours a day. In addition to conducting the drilling operations, Movible's employees were charged with the repair and upkeep of the living quarters unit. Shell performed none of the actual operations on the rig or on the living quarters and had only one permanent representative there.

As noted, on May 6, 1970, one of the water heaters in the

living quarters module exploded causing the deaths and injuries which are the subject of this litigation. The district court found that the explosion was caused by the negligence of Movible in failing to correctly follow the instructions of a safety engineer employed by one of its insurance carriers on the replacement of a relief valve on the heater. While the plaintiffs sued many defendants, including the valve manufacturer, the manufacturer of the thermostats on the water heater, the insurance company which employed the safety engineer, as well as Shell Oil Company, none were found negligent. Instead, only Movible was found negligent and at fault.

REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions concerning the interpretation of the Outer Continental Shelf Lands Act. That Act calls for the utilization of state law in the absence of applicable federal law. As this nation's mainland oil reserves become more and more depleted, fair administration of oil production on the outer continental shelf becomes more crucial. The issue presented is whether or not it is permissible for a federal court to utilize state law which is contrary to the express language and congressional intent behind the Longshoremen's and Harbor Workers' Compensation Act, federal legislation which is incorporated into the Outer Continental Shelf Lands Act.

I. The application of Louisiana state law in this case is improper because such state law is inconsistent with applicable federal legislation, The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901-50 (1979) (hereinafter LHWCA).

A. STATUTORY COVERAGE OF THE OUTER CONTINENTAL SHELF.

The Outer Continental Shelf Lands Act, 43 U.S.C.A. §§ 1331-43 (1964) (hereinafter OCSLA), defines a body of law applicable to the seabed, sub-soil, and fixed structures located on the outer continental shelf (hereinafter OCS). The OCSLA incorporated the LHWCA for the disability or death of workmen on fixed platforms on the OCS. 43 U.S.C.A. 1333(c) (1964). The OCSLA also provides that the law of the adjacent coastal state is applicable to activities on the OCS to the extent that such laws are applicable and not inconsistent with federal laws. *Id.* at § 1333(a)(2). *See Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969). In 1972, Congress amended the LHWCA. In addition to raising the benefits and making administrative changes, the legislation wrought considerable changes in the substantive maritime law of the United States. *See* Comment, *Broadened Coverage Under the LHWCA*, 33 La.L.Rev. 683 (1973).

B. BACKGROUND OF THE 1972 AMENDMENTS TO THE LHWCA.

In *Seas Shipping v. Sieracki*, 328 U.S. 25 (1946), this Court held that the traditional seamen's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under *Sieracki*, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought

into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. In time, this nondelegable duty of seaworthiness was extended to cover injuries brought about by defective equipment brought onboard by the stevedore/contractor. *Alaska S.S. Co. v. Peterson*, 347 U.S. 396 (1954). For example, in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964), this Court upheld the recovery of a longshoreman against a shipowner for injuries that the longshoreman received as a result of defective equipment placed upon the ship by the stevedore, the longshoreman's employer.

The *"Ryan Doctrine"* offset the apparent inequity of *Sieracki* and its progeny. In *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1956), the Court held that a stevedore owed an express or implied warranty of workmanlike performance to the vessel which, if breached, allowed the vessel to recover the damages for which it was liable to an injured longshoreman from the stevedore which employed the longshoreman. Thus, in practice, a seaman who was injured upon a vessel through the negligence of his employer (the stevedore) generally sued and recovered from the shipowner, then the shipowner sued and recovered from the stevedore by virtue of his breach of the warranty of workmanlike performance. The end result was that the longshoreman got an unlimited recovery against his employer, the stevedore, thereby nullifying the whole purpose of a compensation act.

C. THE 1972 AMENDMENTS TO THE LHWCA.

In 1972 Congress amended the LHWCA. As above stated, those amendments improved longshoreman benefits, made

administrative changes, broadened coverage of the Act, eliminated the longshoreman's *Sieracki* remedy, and eliminated the *Ryan* recovery between the vessel owner and the stevedore. Congress felt that the financial resources utilized in the *Sieracki* and *Ryan* type actions could be better utilized to pay improved compensation benefits. H.R. REP. NO. 92-1441, 92d Cong., 2d Sess., *reprinted in* (1972) U.S. CODE CONG. & AD. NEWS 4698, 4702. (Hereinafter cited as House Report).

The Congress legislatively overruled *Sieracki* for several reasons. To begin with, compensation benefits were so low that longshoremen were clogging the courts with third-party claims. *Id.* at 4703. Secondly, it is apparent that Congress disagreed with this Court's analogy between seamen and longshoremen.

> ". . . The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seaman working onboard a vessel while it is in port.
>
> Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. . . .Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of

> stevedores subject to this Act, *Crumady v. The J.H. Fisser*, 358 U.S. 423, *Albanese v. Matts*, 382 U.S. 283, *Skibinski v. Waterman Steamship Corp.*, 330 F.2d 539; for the matter or method in which stevedores or employees of stevedores subject to this Act perform work, *A.N.G. Stevedores v. Ellerman Lines*, 369 U.S. 355, *Blassingill v. Waterman Steamship Co.*, 336 F.2d 367; for gear or equipment of stevedores or employers of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska S.S. Co. v. Peterson*, 347 U.S. 396, *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315. . . ." *Id.* at 4703.

D. COURTS HAVE NOT DEROGATED FROM CONGRESS'S ABOLITION OF THE UNSEAWORTHINESS REMEDY FOR WORKERS COVERED BY THE LHWCA

In *Gay v. Ocean Transport & Trading Ltd.*, 546 F.2d 1233 (5th Cir. 1977), the Fifth Circuit was asked to decide what standard of negligence is to be applied in suits brought against vessels under the 1972 Amendments to the LHWCA. Agreeing with the Second and Fourth Circuits, the Fifth Circuit decided that land-based principles, rather than maritime principles are to guide in the establishment of a federal law.

> "But this is exactly the type of liability without fault concept from which Congress sought to free vessels by the passage of the 1972 Amendments. *Napoli v. Helenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976); *Bess v. Agromar Line*, 518 F.2d 738 (4th Cir. 1975); *Solsvik vs. Maremar Compania Naviera S.A.*, 399 F.Supp. 712 (W.D. Wash. 1975); . . ." 546 F.2d at 1239.

The United States District Court for the Central District of California reached the same result as *Gay* in *Tofilovich v. D'Amico Mediterranean/Pacific Line*, 415 F.Supp. 732 (C.D. Cal. 1976). In that case the Court refused to apply the Restatement Section of Torts, §§ 413 and 146 (1965) to hold a shipowner vicariously liable for the negligence of the stevedore, holding that this "would do violence to the latter and policy of 33 USC §905(b) . . . . Congress specifically included a rule of vicarious liability, specifically excluded a rule of liability without fault and specifically excluded the concept of a non-delegable duty, all of which are the express and explicit result of Section 416." 415 F.Supp. at 734-736. *See also Frasca v. Prudential-Grace Lines, Inc.*, 394 F.Supp. 102 (D. Md. 1975); *Anuszewski v. Dynamic Mariners Corp.*, 391 F. Supp. 1143, 1145 (D. Md 1975), *aff'd*, 540 F.2d 757 (4th Cir. 1976) (per curium); *Lucus v. "Brinknes" Schiffahrts Ges.*, 379 F.Supp. 759 (E.D. Pa 1974). A recent case reaffirming the congressional abolition of the unseaworthiness remedy is *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir. 1978).

E. THE APPLICATION OF LOUISIANA LAW CONTRAVENES THE CONGRESSIONAL INTENT OF THE 1972 AMENDMENTS TO THE LHWCA:

As stated above, the OCSLA allows the application of the law of the adjacent coastal state, but only in the absence of applicable federal law. 43 U.S.C.A. § 1333(a)(2). The LHWCA is expressly applicable to workers on the OCS. 43 U.S.C.A. §1333(c). Thus, the law of the adjacent coastal state cannot be applied in those areas covered by the LHWCA. The 1972 Amendments to the LHWCA legislatively overrule the *Sieracki*-type recovery for longshoremen. The *effect* of the application of Louisiana law in the instant con-

troversy is to reinstate a seaworthiness-type recovery for workers subject to the LHWCA on the OCS.

One of the inequities of the *Sieracki*-type recovery which Congress sought to remedy through the 1972 Amendments of the LHWCA was the fact that the shipowner could be held liable for injuries to longshoremen resulting from defective gear supplied by the longshoremen's employer. House Report at 4703. Shell recognizes that the Louisiana Supreme Court's decision did not deal with seaworthiness or unseaworthiness, but Shell submits that while the state court decision may not expressly deal with seaworthiness or unseaworthiness, since it dealt with federal legislation the *effects* of the state court decision is of more importance than the language of the decision. The effect of the Louisiana Supreme Court's decision is to hold Shell, the platform owner, strictly liable for the defective condition of the property of Movible, the contractor. Pretermitting the Louisiana Supreme Court's dubious analysis of Louisiana law, the *effect* of applying that decision on the OCS is a species of unseaworthiness and therefore contrary to federal law, the LHWCA.

The Louisiana Supreme Court's decision effectively brings about the same conditions which necessitated the 1972 Amendments to the LHWCA. In this case we have: (1) an injured individual who falls within the purview of the LHWCA, (2) a non-negligent party, not subject to the protection of the LHWCA, who is forced to pay for the injuries of a contractor's employee, (3) a species of strict liability for injury caused by property not belonging to the person cast in judgment and (4) possibly some method of indemnity by which the person cast in judgment can recover from the true owner of the object or party truly at fault.

It will serve to clarity, and not redundancy, to emphasize that in the present situation no court has held that Shell was negligent in respect of these deaths and injuries. Indeed, the plaintiffs do not even urge this point. Instead, Shell's liability was fixed by a dubious interpretation of Louisiana law which made it the owner of Movible's equipment so as to provide Movible's employees with a third party tort remedy. As long as, of course, the equipment was "owned" by Movible, those employees had no cause of action, Movible being insulated by the LHWCA from any such liability.

That this was expressly and explicitly done is plain from the Louisiana Supreme Court's decision itself:

> "Unquestionably as between Shell and Movible, the latter remained the owner of its drilling rig and living unit." 365 So.2d at 1290.

Despite this language, there then follows a contrived analysis in which Shell was made the "owner" of the drilling rig and living unit for purposes of third party tort suits. Shell submits either it was the owner of the drilling rig and living unit or it was not. In the 1972 Amendments to LHWCA, Congress spoke to the question of this kind of liability and abolished it. This court should grant certiorari to correctly place this case in line with preemptive and prevailing federal law.

II. Whether the Fifth Circuit Court of Appeals' holding that a fixed platform on the outer continental shelf is a "building" is in conflict with the Outer Continental Shelf Lands Act.

Shell's liability in this case was fixed under Article 2322 of

the Louisiana Civil Code. This article deals with the liability of the owner of a building in damages for the "ruin" of his building. Before liability can be placed under the article, however, three threshhold requirements must be met: there must be a building, the defendant must be its owner, and building must have fallen to ruin. *Moczygemba v. Danos & Curole Marine Contractors*, 561 F.2d 1149 (5th Cir. 1977); *Mott v. ODECO*, 577 F.2d 273 (5th Cir. 1978); *Olsen v. Shell Oil Co.*, 365 So.2d 1285 (La. 1979).

In the present case the Louisiana Supreme Court characterized Shell's platform as a building and held that Movible's drilling rig placed on it became a component part of this building. The obvious purpose, again, was to create a third party tort remedy for the plaintiffs.

This characterization flies in the face of this Court's own law in the subject. In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), this Court decreed that platforms such as the one in this case are islands, "albeit artificial ones." As an island, although artificial, it is clear that in law the platforms are to be considered as land or the soil. Indeed, in *In Re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1974), the Fifth Circuit noted that in *Rodrigue* this Court viewed the "island-platforms . . . as extensions of the sub-soil." (See 499 F.2d 263, 272 n.18.) Shell's platform, accordingly, was not a building. This Court should grant the writ sought to correct the obvious error of the Louisiana Supreme Court holding it to be a building.

CONCLUSION

For these reasons, a writ of certiorari should issue to re-

view the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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August 22, 1979

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CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of August, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to William P. Rutledge, Esq., P.O. Box 3668, Lafayette, Louisiana 70501, and to Joel L. Borrello, 4500 One Shell Square, New Orleans, Louisiana 70139, Counsel for the Respondents. I further certify that all parties required to be served have been served.

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